

# Taking the Employer's Gun and Bargaining About Returning It: A Reply to "A Law, Economics, and Negotiations Approach" to Striker Replacement Law

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*"You just shot an unarmed man."  
"Well, he should've armed himself. . . ."*<sup>1</sup>

## I. THE CURRENT STATE OF STRIKER REPLACEMENT LAW

Since 1938, the law governing replacement of striking employees has permitted employers to hire permanent replacements for economic strikers. This rule, known as the *Mackay* doctrine,<sup>2</sup> is one of the most vehemently debated of all labor law principles.<sup>3</sup> Opponents of the *Mackay* doctrine argue that it renders the statutory right to strike ineffective because striking employees' jobs are placed in jeopardy.<sup>4</sup> The Workplace Fairness Act,<sup>5</sup> which died as a result of a Republican-led filibuster and the failure of efforts to invoke cloture in the United States Senate in July 1994,<sup>6</sup> was the latest failed attempt to overturn *Mackay* legislatively. Other proposed legislation to overturn or

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<sup>1</sup> UNFORGIVEN (Warner Bros. 1992).

<sup>2</sup> NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

<sup>3</sup> See, e.g., Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 393 (1984) ("[F]ew rules of American labor law have been as heavily criticized as the legality of hiring permanent strike replacements.").

<sup>4</sup> See, e.g., Matthew W. Finkin, *Labor Policy and the Evisceration of the Economic Strike*, 1990 U. ILL. L. REV. 547, 574 ("[Mackay] has taken on a life of its own, ultimately to eclipse the statutory right it was intended to balance."); Daniel Pollitt, *Mackay Radio: Turn It Off, Tune It Out*, 25 U.S.F. L. REV. 295, 300 (1991) (asserting that *Mackay* "makes a mockery of the supposed right to strike").

<sup>5</sup> S. 55, 103d Cong., 1st Sess. (1993). The House version was the Cesar Chavez Workplace Fairness Act, H.R. 5, 103d Cong., 1st Sess. (1993).

<sup>6</sup> *Defeat of Striker Replacement Bill a Victory for Business Coalition*, Daily Lab. Rep. (BNA) No. 133 (July 14, 1994).

modify *Mackay* has been considered by Congress every year since 1988.<sup>7</sup>

With the defeat of the Workplace Fairness Act and the election of a Republican majority to both houses of Congress in November 1994, it appeared that no modification of striker replacement law was likely in the immediate future. This is an area of the law, however, in which organized labor is tenaciously committed to reform and in which business is perhaps equally committed to preserving the status quo. Unable to have legislation passed to prohibit the hiring of permanent replacements, organized labor won a smaller victory on a different front.

On March 8, 1995, President Clinton issued Executive Order 12,954, "Ensuring the Economical and Efficient Administration and Completion of Federal Government Contracts."<sup>8</sup> The Executive Order states that the policy of

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<sup>7</sup> See William R. Corbett, *A Proposal for Procedural Limitations on Hiring Permanent Striker Replacements: "A Far, Far Better Thing" Than the Workplace Fairness Act*, 72 N.C. L. REV. 813, 827 n.74 (1994).

<sup>8</sup> Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (1995). President Clinton's up-and-down relationship with organized labor has been closely tied to his position on, and efforts relating to, the striker replacement issue. It might be said that Executive Order 12,954 is an effort to honor commitments Mr. Clinton made to organized labor as a presidential candidate and as President. The legislative overturning of *Mackay* was a significant issue in the 1992 presidential campaign. On April 8, 1992, Governor Clinton, then the front-runner for the Democratic nomination, appeared on the picket lines in Peoria, Illinois at one of the most highly publicized strikes in recent times—the United Auto Workers' strike of Caterpillar—and announced his support of the strikers. Cynthia Todd, *Clinton Backs Strikers' Rights*, ST. LOUIS POST-DISPATCH, Apr. 9, 1992, at A1. Organized labor endorsed the Clinton candidacy. Less than one year after President Clinton took office, relations between the President and organized labor became strained. The President lobbied hard for passage of the North American Free Trade Agreement, which labor opposed. After passage of NAFTA, many labor leaders expressed their disappointment in the President. See *Labor Berates Clinton over NAFTA, Seems Cool Toward Reconciliation*, Daily Lab. Rep. (BNA) No. 222 (Nov. 19, 1993). Some labor leaders suggested that President Clinton's best opportunity to assuage them would be to lobby as hard for passage of the Workplace Fairness Act as he had for NAFTA. See *Organized Labor Launches New Effort for Passage of Striker Replacement Bill*, Daily Lab. Rep. (BNA) No. 51 (Mar. 17, 1994); *UAW President Bieber Suggests Clinton Rebuild Relations by Backing Striker Replacement Bill*, Daily Lab. Rep. (BNA) No. 233 (Dec. 7, 1993). President Clinton reiterated his support for the Workplace Fairness Act. See, e.g., *Aide Reaffirms Clinton Support for Workplace Fairness Bill*, Daily Lab. Rep. (BNA) No. 73 (Apr. 18, 1994). Indeed, Labor Secretary Robert Reich on occasions assured organized labor that the Clinton administration would obtain passage of the bill. *Unions Must Make Labor Law Reform Issue in Congressional Elections, Donahue Says*, Daily Lab. Rep. (BNA) No. 93 (May 17, 1994). As discussed above, the bill died in the Senate. Some labor leaders suggested that President Clinton did not work very hard to get the votes to break the filibuster in the Senate—certainly not as hard as he had worked for passage of NAFTA. See *Health Care Battle Likely to Unite Industry for Battle over Comprehensive Job Safety Bill*, Daily Lab. Rep. (BNA) No. 29

the executive branch in procuring goods and services is that "contracting agencies shall not contract with employers that permanently replace lawfully striking employees."<sup>9</sup> The Order authorizes the Secretary of Labor<sup>10</sup> to investigate federal contractors to determine whether they have permanently replaced lawful strikers.<sup>11</sup> If the Secretary determines that a contractor has hired permanent replacements, then the Secretary may exercise either or both of the following options: find that it is appropriate to terminate existing contracts for convenience; and find that it is appropriate to debar the contractor from future contracts and renewal of existing contracts until resolution of the labor dispute.<sup>12</sup>

The business camp did not sit idly by as part of its victory in Congress slipped away via executive order. First, Republicans in the Senate attempted to block implementation of the Executive Order by amending a Defense Department supplemental appropriations bill. Ironically, in a congressional battle reminiscent of the defeat of the Workplace Fairness Act, the legislative effort to defeat the Executive Order was thwarted by a Democrat-led filibuster, which forced withdrawal of the proposed amendment when the supporters of the legislation fell two votes short of invoking cloture.<sup>13</sup>

Failing to defeat the Executive Order in Congress, a business coalition that very day filed suit in the United States District Court for the District of Columbia, seeking a temporary injunction and declaratory relief prohibiting the

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(Feb. 14, 1994); *Unions: Trunka Says to Leadership of AFL-CIO It's Time to "Either Lead or Follow,"* Daily Lab. Rep. (BNA) No. 62 (Mar. 31, 1995). President Clinton's issuance of Executive Order 12,954 is perhaps, in part, an effort to repair damaged relations with organized labor resulting from the defeat of the Workplace Fairness Act. *See Auto Workers: Clinton Tells Union Delegates He Will Fight Repeal of Executive Order*, Daily Lab. Rep. (BNA) No. 113 (June 13, 1995).

<sup>9</sup> Exec. Order No. 12,954, § 1, 60 Fed. Reg. 13,023.

<sup>10</sup> The Secretary of Labor delegated his authority under the Order to the Assistant Secretary for the American Workplace. Sec. Order No. 2-95, 60 Fed. Reg. 13,602 (1995).

<sup>11</sup> Exec. Order No. 12,954, § 2, 60 Fed. Reg. 13,023. The Order and regulations promulgated thereunder apply only to federal contracts in excess of one hundred thousand dollars. Permanent Replacement of Lawfully Striking Employees by Federal Contractors, 60 Fed. Reg. 27,855, 27,861 (1995) (to be codified at 29 C.F.R. ch. II and pt. 270) [hereinafter Permanent Replacement].

<sup>12</sup> Exec. Order No. 12,954, §§ 3-4, 60 Fed. Reg. 13,023-24; Permanent Replacement, *supra* note 11, §§ 270.12 (authorizing the Secretary to find that debarment or termination for convenience is appropriate), 270.14 (setting out procedures for termination of contract for convenience), 270.15 (setting out procedures for debarment).

<sup>13</sup> *Striker Replacements: Senate Democrats Keep Clinton Order Alive; Bridgestone/Firestone Seeks Relief in Court*, Daily Lab. Rep. (BNA) No. 51 (Mar. 16, 1995).

administration or enforcement of the Executive Order.<sup>14</sup> In May 1995, the court ruled that the case was not ripe for review and that the plaintiffs failed to establish that they were entitled to a preliminary injunction to avoid irreparable harm.<sup>15</sup> The plaintiffs appealed, and the Court of Appeals for the District of Columbia denied the appellants' motion to stay enforcement of the Executive Order but agreed to expedite the appeal.<sup>16</sup> The appellate court then reversed the district court's order and remanded the case for expedited review.<sup>17</sup> With the judicial challenge to the Executive Order resuscitated, the Labor Department initiated an investigation of one of the plaintiffs in the litigation—Bridgestone/Firestone,<sup>18</sup> which hired a reported 2300 replacement workers for employees participating in a United Rubber Workers' strike.<sup>19</sup> The Department later was enjoined, however, from enforcing the Executive Order. On remand of *Chamber of Commerce v. Reich* from the court of appeals, the district court, although holding that the plaintiffs' challenge of the Executive Order failed, concluded that an injunction against enforcement was warranted pending appeal of the district court's decision.<sup>20</sup> The Department of Labor's subsequent motion

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<sup>14</sup> *Id.*

<sup>15</sup> *Chamber of Commerce v. Reich*, 886 F. Supp. 66 (D.D.C.) (order denying plaintiffs' motion for preliminary injunction and for summary judgment and granting defendant's motion to dismiss, or in the alternative, for summary judgment), *rev'd*, 57 F.3d 1099 (D.C. Cir. 1995).

<sup>16</sup> *Reich*, 57 F.3d at 1100.

<sup>17</sup> *Id.* at 1101. The court held that the case satisfied the two-pronged test for ripeness established in *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967). The court held that the case satisfied the fitness requirement because it involved "purely legal questions," the Secretary of Labor had promulgated final regulations under the Executive Order after the district court issued its order dismissing the case, and regardless of whether the Order and regulations ultimately result in the termination of any contracts or debarment of any contractors, the "existence of the Order alters the balance of bargaining power between employers and employees." *Id.* at 1100. The court elaborated on this last point in its discussion of the second prong—hardship: "[T]he Order confronts employers with the difficult choice between surrendering their right to hire permanent replacements and risking the loss of current and future government contracts." *Id.* at 1101.

<sup>18</sup> Letter from Charles Richards, Deputy Assistant Secretary for the American Workplace, to Masatoshi Ono, Chief Executive Officer of Bridgestone/Firestone, Inc. (June 26, 1995); see also Defendant's Supplemental Filing, *Chamber of Commerce v. Reich*, 886 F. Supp. 66 (D.D.C. 1995) (No. 95-0503) (filing of final regulations and submission of letter sent to Bridgestone/Firestone). The letter and supplemental filing are reprinted in *Labor Dept. Letter, Court Papers on Bridgestone/Firestone Dispute*, Daily Lab. Rep. (BNA) No. 125 (June 29, 1995).

<sup>19</sup> *Striker Replacement: Bridgestone Said Example of Company that Executive Order Could Affect*, Daily Lab. Rep. (BNA) No. 46 (March 9, 1995).

<sup>20</sup> *Chamber of Commerce v. Reich*, 897 F. Supp. 570 (D.D.C. 1995). The court first held that the President's issuance of the Executive Order was not subject to judicial review

to vacate the injunction proved unavailing, as the district court held that it lacked jurisdiction because a notice of appeal had been filed.<sup>21</sup>

While the judicial challenge to the Executive Order remained alive, a further legislative effort to thwart enforcement failed. On September 28, 1995, Democrats again employed the filibuster<sup>22</sup> to prevent a vote on the Senate floor on the Labor Department's 1996 spending bill, which had a rider attached that would have prohibited the Department from expending funds to implement the Executive Order.<sup>23</sup> Thus, while the battle over Executive Order 12,954 appears to be over on the legislative front, it continues in the judicial arena, where it eventually may be decided by the Supreme Court.

Regardless of the outcome of the challenge to the Executive Order, the recent battles between organized labor and business over permanent replacement of strikers indicate that the war is not over. The near passage of the Workplace Fairness Act in 1994, and the issuance of Executive Order 12,954 in 1995, suggest that no matter how hard the business camp fights to preserve the *Mackay* doctrine, it will not be preserved inviolate. Many commentators have proposed reforms of striker replacement law that fall somewhere along the spectrum between a ban on hiring of permanent replacements (a complete reversal of *Mackay*) and an unyielding preservation of *Mackay*.<sup>24</sup>

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under *Dalton v. Spector*, 114 S. Ct. 1719 (1994). *Reich*, 897 F. Supp. at 574-77. Acknowledging that the parameters of *Dalton* are not yet defined and that the case before it was likely to go to the Supreme Court, the district court went on to address the merits of the legal issues and to decide the case in favor of the defendant. *Id.* at 573, 576-77. On the merits, the district court first held that the Executive Order was authorized under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471-544 (1988). *Reich*, 987 F. Supp. at 577-81. The court then held that that Executive Order was not subject to the preemption doctrine under the National Labor Relations Act. *Id.* at 581-84. After deciding that under *Dalton* the case must be dismissed, the court turned to the issue of an injunction pending appeal. Focusing on the likelihood of irreparable harm in the absence of an injunction, the court quoted from the court of appeals' decision regarding the dilemma enforcement would present plaintiffs of surrendering the right to hire permanent replacements or risking the loss of government contracts. *Id.* at 585. Accordingly, the court granted an injunction pending appeal of its decision. *Id.*

<sup>21</sup> *Chamber of Commerce v. Reich*, 150 L.R.R.M. (BNA) 2269 (D.D.C. 1995).

<sup>22</sup> See *supra* note 13 and accompanying text.

<sup>23</sup> *Striker Replacements: Senate Democrats Block Labor, HHS Bill, Demonstrating Support for Striker Order*, Daily Lab. Rep. (BNA) No. 189 (Sept. 29, 1995).

<sup>24</sup> E.g., Corbett, *supra* note 7, at 886-95; Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 423 (1992); Samuel Estreicher, *Collective Bargaining or "Collective Begging"? Reflections on Antistrikebreaker Legislation*, 93 MICH. L. REV. 577, 601-08 (1994); Douglas E. Ray, *Some Overlooked Aspects of the Strike Replacement Issue*, 41 KAN. L. REV. 363, 400

One of the most recent entries among the proposals to reform striker replacement law is that of Professors Leonard Bierman and Rafael Gely. They recommend overturning *Mackay*, initially prohibiting employers from hiring permanent replacements, and making that issue a mandatory bargaining topic.<sup>25</sup> It may seem ironic to speak of weapons and shootings in a reply to Bierman and Gely's proposal to resolve the volatile issue of striker replacement through collective bargaining. There are two reasons why I use such terms, however. First, Bierman and Gely's proposal is not just about resolving the permanent replacement of strikers through bargaining; it begins by taking the employer's principal economic weapon and allowing the union to keep its own weapon. Second, war and battle terminology has long provided the metaphors of choice to describe disagreements between employers and organized labor under the National Labor Relations Act.<sup>26</sup> With that preface, I begin with an allegorical rendering of Bierman and Gely's proposal and my objections to it.<sup>27</sup>

## II. TAKING THE EMPLOYER'S GUN AND PUTTING IT ON THE TABLE: AN ALLEGORY

The Sheriff has been in town for some time and has seen a number of bloody gunfights between the two old gunslingers, Employer and Union.<sup>28</sup> He

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(1992); George S. Roukis & Mamdouh I. Farid, *An Alternative Approach to the Permanent Striker Replacement Strategy*, 44 LAB. L. J. 80, 89-91 (1993); Deborah Eberts, Comment, *The Mackay Doctrine: The Grand Dame of Labor Law Clashes with the Current State of the Union*, 57 J. AIR L. & COM. 257 (1991); Hal K. Gillespie, Comment, *The Mackay Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782, 782-87 (1972); John G. McDonald, Note, *Leveling the Playing Field or Tipping the Scales? Pending Strike Legislation: The Latest Battlefield Between Labor and Management—An Alternative Solution*, 42 SYRACUSE L. REV. 971, 991-94 (1991); Note, *One Strike and You're Out? Creating an Efficient Permanent Replacement Doctrine*, 106 HARV. L. REV. 669, 670 (1993) [hereinafter Note, *One Strike*]; Note, *The Unfair Labor Practice Strike: A Critique and a Proposal for Change*, 46 N.Y.U. L. REV. 988, 1009-11 (1971).

<sup>25</sup> Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics, and Negotiations Approach*, 68 S. CAL. L. REV. 363 (1995).

<sup>26</sup> See, e.g., DOUGLAS L. LESLIE, CASES AND MATERIALS ON LABOR LAW: PROCESS AND POLICY ch. 3 (3d ed. 1992) (Chapter three is entitled "Economic Weapons"); Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803, 1825 (1993) ("The modern strike is often described as industrial warfare. The modern strike, like modern warfare, is likely to involve many battles and a variety of theaters of operation.").

<sup>27</sup> Characteristic of the genre, this allegory oversimplifies the issues, but it is a useful beginning point in this critique of Bierman and Gely's proposal.

<sup>28</sup> I borrow the gun metaphor for the employer's *Mackay* right to hire permanent

decides that something has to be done to end the bloodshed. He steps between Union and Employer and tells Employer to hand over his gun. Employer looks stunned. "Is he going to turn his<sup>29</sup> in, too?" Employer asks, pointing at Union.

"No, he isn't," responds the Sheriff.

"Then why should I turn mine in? Don't you think he'll shoot me if he has a gun and I don't?" snorts Employer as he clutches the handle of his six-shooter.

"No, Union will not shoot you if you turn in your gun. You're going to have to turn it in. Union thinks you shoot his people<sup>30</sup> too often when they shoot at you," explains the Sheriff.

"I don't see how I can be sure he won't shoot me if I turn in my gun," protests Employer.

"Oh, didn't I mention that you may get your gun back? After you turn it in, we're going to put it on this table, and you and Union are going to sit down and bargain about whether Union will give it back to you," explains the Sheriff.

Employer laughs aloud. "Why would he give me my gun back?"

"He might, if you are willing to pay him enough for it," explains the Sheriff.

"You really think he would sell me my gun back, knowing I could shoot his people with it?" asks Employer.

"Yes, I think he might if the price were right. I'll advise him so that he will see the wisdom of selling it back to you under certain circumstances. Now you sit down and talk with Union!" demands the Sheriff as he pulls the six-shooter from Employer's holster. Employer is apprehensive about bargaining with Union without his gun, but the Sheriff has laid down the new law.

Union and Employer begin bargaining. Employer mentions that he would

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replacements for economic strikers from Professor Pollitt: "What was a loaded pistol waiting to be fired in 1938, and thereafter for a number of years, is now used with a vengeance, and the victims are the promises of the NLRA." Pollitt, *supra* note 4, at 311.

<sup>29</sup> Although some may object to my calling the right to strike a gun, most would admit that the strike is the union's principal economic weapon and it is capable of inflicting harm on the employer. See Bierman & Gely, *supra* note 25, at 387. For purposes of this metaphorical rendering, I will symbolize both the employees' right to strike and the employer's right to hire permanent replacements as guns; however, I will leave open the question of whether the employees' right to strike is as large and as powerful a gun as the employer's right to hire permanent replacements. For argument that the *Mackay* right enables employers to inflict far greater injury on employees than the right to strike enables employees to inflict on employers, see Walter Kamiat, *Strikers and Replacements: A Labor Union Perspective*, in PROCEEDINGS OF NEW YORK UNIVERSITY 43RD ANNUAL NATIONAL CONFERENCE ON LABOR 23, 43-46 (Bruno Stein ed., 1990).

<sup>30</sup> Union is hired by many of the townspeople to protect them from Employer.

like to buy back his gun. The moment he says that, Union reaches down and taps his fingers on the gun protruding from his holster. Employer wipes the sweat from his brow, asks Union to calm down, and they continue talking. There are several issues on which they do not agree, and each time a disagreement develops, Union slowly, deliberately touches his holstered gun. Employer reaches down and feels his empty holster.

Employer again asks whether Union will sell him the gun. He wants it back very badly because he feels inexplicably vulnerable under these circumstances. Union laughs and suggests that it will cost a lot. Employer says he is willing to pay a lot. The Sheriff steps forward and whispers something to Union.<sup>31</sup> After listening to the Sheriff, Union says to Employer, "Of course, if I sell you your gun back, I will only give you enough bullets to shoot some of my people, and I will choose which ones you can shoot at." At that, Union's people, who have been calmly watching their hired gun bargaining for them until now, become visibly nervous. One of them yells, "Don't let him shoot *me*, Union!" Another jumps to his feet and demands, "Don't let him shoot *me*!" Still another screams, "Remember, Union, we pay you to protect us!" A fight breaks out among Union's people.

Union, annoyed by the dissension he has created in his ranks by following the Sheriff's advice, screams back: "Sit down and shut up back there. I'm doing the best I can. If you don't like it, sue me."<sup>32</sup>

Employer is very worried now. The clashes among Union's people have so agitated Union that he appears ready to go for his gun and shoot Employer in an effort to reunify them. "Well, the ones I would *need* to shoot to protect myself would be that group over there. I will pay a lot to get my gun back and get enough bullets to shoot them," offers Employer.

The Sheriff shakes his head and steps forward and whispers something else to Union.<sup>33</sup> Union turns suddenly and angrily tells the Sheriff to stay out of

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<sup>31</sup> He is telling Union that he can bargain away, for the right price, the right to shoot some of the people Union represents, but not others. See Bierman & Gely, *supra* note 25, at 392 ("[T]here is nothing wrong [no breach of the duty of fair representation] with having a union negotiate a contract provision that is designed to reward the expectations of a group of employees already within the bargaining unit, even if the union ignores the interests of other employees within the same unit."); *id.* at 388 ("Our proposal will also allow the union and the employer, themselves, to make a distinction between the skill level of their workers . . .").

<sup>32</sup> Unions would be unlikely to lose breach of the duty of fair representation lawsuits based on bargaining for different permanent replacement rights for different groups of employees. See Bierman & Gely, *supra* note 25, at 391-93.

<sup>33</sup> He is telling Union that these people (those with firm-specific skills) are precisely the ones who need to be protected against Employer's opportunistic behavior. Bierman & Gely, *supra* note 25, at 378-79. According to the Sheriff, Union should not bargain away



Union's business.

How does the bargaining end? The most likely ending is that Union and Employer cannot agree about the gun or some other matter. Union threatens to go for his gun unless Employer agrees to his terms. "If you do, I'll . . ." stammers Employer.

"You'll do what?" laughs Union.

Employer may have some other weapon—a knife, perhaps.<sup>34</sup> Is Employer willing to risk a fight without his gun? Maybe. If so, Union draws his gun and shoots Employer. Employer, wounded, reaches for his knife, if he has one. Although the outcome of this fight depends on many things, including how skillful Employer is with his knife and how skillful Union is with his gun, Union probably has the advantage. Employer probably agrees to Union's demands to save himself.

### III. ANALYSIS OF "A LAW, ECONOMICS, AND NEGOTIATIONS APPROACH" TO STRIKER REPLACEMENT LAW

Professors Bierman and Gely and I agree on one major point: the current law regarding permanent replacement of strikers should be reformed in a way that limits employers' ability to engage in opportunistic behavior. We disagree, however, on how that should be done. I would preserve the *Mackay* doctrine but restrict it with procedural limitations.<sup>35</sup> In contrast, the first step in Bierman and Gely's proposal is to overturn *Mackay*.

I also agree with Bierman and Gely that collective bargaining offers a way in which the parties themselves might resolve whether the employer retains the right to hire permanent replacements for strikers. I disagree with them, however, that no meaningful bargaining can take place on that issue until *Mackay* is overruled and the initial entitlement is shifted. Unions and

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their protection against being shot.

<sup>34</sup> This weapon represents the hiring of temporary replacements, operating with nonstriking bargaining unit personnel, moving supervisors to the strikers' positions, and other steps to maintain operations during a strike. See CHARLES R. PERRY ET AL., OPERATING DURING STRIKES: COMPANY EXPERIENCE, NLRB POLICIES, AND GOVERNMENTAL REGULATIONS 51-68 (1982); Finkin, *supra* note 4, at 562. Although these weapons may enable the employer to endure a strike, they are not depicted here as guns because they do not inflict the kind of harm on the striking employees that permanent replacement does, and they do not endanger the future of the bargaining relationship.

<sup>35</sup> See Corbett, *supra* note 7, at 886. My proposal for reform of striker replacement law also advocates taking the gun from the employer, at least temporarily. My proposal does not, however, leave it to the union to determine whether the employer gets the gun back; it leaves that determination to the National Labor Relations Board, its administrative law judges, and its regional offices. *Id.* at 886-95.

employers can bargain on the issue of permanent replacement under current law; there is nothing preventing parties from agreeing to a provision of a collective bargaining agreement limiting or prohibiting an employer's hiring of permanent replacements for strikers.

Bierman and Gely also argue that the law governing striker replacement should distinguish between employees who have made firm-specific investments and those who have not.<sup>36</sup> Their proposal calls for unions to differentially protect employees in collective bargaining in accordance with that distinction.<sup>37</sup> Even if unions could make the distinctions as Bierman and Gely argue, I do not think that most unions would or should adopt such a bargaining strategy.<sup>38</sup>

Generally, I disagree with Bierman and Gely's proposal because I think it is theoretically unsound, and it would not function in practice as they posit. The following sections set forth my specific disagreements with their proposal.

#### *A. Failure to Recognize or Appreciate Significant Limitations Imposed on Employers' Use of Permanent Replacements Under Current Law*

Bierman and Gely want the law governing permanent replacement of strikers to produce efficient results. Professors Cohen and Wachter argue that the current law does that.<sup>39</sup> They see the *Mackay* doctrine as playing a vital role in preventing opportunistic behavior by *both* unions and employers.<sup>40</sup> Bierman and Gely challenge them on part of this proposition, arguing that the current law does not impose sufficient limits on opportunistic behavior by employers.<sup>41</sup>

While I agree with Bierman and Gely that the current law needs to be reformed to impose more restrictions on employers' opportunistic behavior, they fail to recognize or appreciate some of the limitations that the current law does impose. Bierman and Gely attack Cohen and Wachter's argument that the external labor market limits opportunistic behavior by employers because employers will find it difficult to hire permanent replacements at below-market wages and because replacements would be reluctant to make firm-specific

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<sup>36</sup> Bierman & Gely, *supra* note 25, at 374, 378-80.

<sup>37</sup> *Id.* at 383 ("[I]f courts or Congress make the decision of whether to hire striker replacements a mandatory issue of bargaining, unions and employers could make the distinction between firm-specific and general investments made by workers . . .").

<sup>38</sup> See *infra* part III.D.

<sup>39</sup> George M. Cohen & Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, in PROCEEDINGS OF NEW YORK UNIVERSITY 43RD ANNUAL NATIONAL CONFERENCE ON LABOR, *supra* note 29, at 109, 111.

<sup>40</sup> *Id.* at 118.

<sup>41</sup> Bierman & Gely, *supra* note 25, at 374-78.

investments in firms that develop a reputation for behaving opportunistically.<sup>42</sup> Although Bierman and Gely argue persuasively on this point, they fail to recognize or appreciate the significance of Cohen and Wachter's identification of deterrents to employers' opportunistic behavior in not only these external labor market checks, but also in "Court and board rulings [that] improv[e] the likelihood of efficient outcomes."<sup>43</sup> Stated differently, *Mackay* does not constitute all of the law on the hiring of permanent replacements for striking employees. Although *Mackay* favors employers, other decisions of the Supreme Court and the National Labor Relations Board favor employees by restricting *Mackay* in various ways.

Cohen and Wachter discuss three Supreme Court decisions and one National Labor Relations Board decision that limit *Mackay*: *NLRB v. Erie Resistor Corp.*<sup>44</sup> (prohibiting employers from offering superseniority to strike crossovers); *NLRB v. Fleetwood Trailer Co.*<sup>45</sup> and *NLRB v. Laidlaw Corp.*<sup>46</sup> (enforcing the reinstatement rights of permanently replaced strikers); and *NLRB v. Curtin Matheson Scientific, Inc.*<sup>47</sup> (affirming the NLRB's decision to adopt no presumption regarding permanent replacements' support for, or opposition to, an incumbent union). In addition to those cases, many decisions of the National Labor Relations Board and the federal courts of appeals have made it more difficult for employers to hire permanent replacements for strikers and retain them after the strike and to displace an incumbent union through such a strategy.<sup>48</sup>

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<sup>42</sup> *Id.* at 375; see also Note, *One Strike*, *supra* note 24, at 678 n.51 ("Wachter and Cohen miss the fundamental point that unorganized labor, because of informational imperfections and mobility deficiencies . . . are unable to accurately assess the true competitive market wage rate.").

<sup>43</sup> Cohen & Wachter, *supra* note 39, at 117.

<sup>44</sup> 373 U.S. 221 (1963).

<sup>45</sup> 389 U.S. 375 (1967).

<sup>46</sup> 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

<sup>47</sup> 494 U.S. 775 (1990).

<sup>48</sup> Consider, for example, the following principles that favor the striking employees and the unions by making it risky for employers to hire permanent replacements. The burden is on the employer to prove that it has hired permanent replacements. See, e.g., *Gibson Greetings, Inc.*, 310 N.L.R.B. 1286, 1290 (1993), *enforcement denied in part*, 53 F.3d 385 (D.C. Cir. 1995). Ambiguity in the wording of replacement offers is construed against the employer. See, e.g., *Hansen Bros. Enters.*, 279 N.L.R.B. 741 (1986), *review denied*, 812 F.2d 1443 (D.C. Cir.), *cert. denied*, 484 U.S. 845 (1987). The most important limitation on *Mackay* is that employers may hire permanent replacements for only economic strikers; the *Mackay* right to hire permanent replacements does not apply to unfair labor practice strikes. Ray, *supra* note 24, at 368. Unions almost always contend that strikes are unfair labor practice strikes, and the standards for determining the characterization of a

There is another limitation imposed on employers' potential opportunistic behavior by the internal labor market. The employees that Bierman and Gely argue should be protected from permanent replacement are those who have made investments in firm-specific training. As Bierman and Gely note, the very characteristic that could make these employees targets of opportunistic behavior, their firm-specific skills, also provides them protection against such conduct. They are the employees that the employer would have the most difficulty replacing because the replacements must be trained, and that training involves both cost and time.<sup>49</sup>

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strike favor unions and the striking employees. A strike is classified as an unfair labor practice strike if it was "caused in whole or in part by an employer's unfair labor practices." *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319 (7th Cir. 1989). A strike that begins as an economic strike is converted into an unfair labor practice strike if an employer's unfair labor practice is a factor in prolonging the strike. *See, e.g., C-Line Express*, 292 N.L.R.B. 638, 638 (1989). The Board treats some types of unfair labor practices as resulting in per se conversion of an economic strike into an unfair labor practice strike without even considering the subjective evidence to determine whether the striking employees considered the unfair labor practice a cause of the strike. *Id.* Suppose an employer, concluding that it lawfully could hire permanent replacements and that it in fact has done so, denies reinstatement to striking employees who offer to return to work. If the employer's conclusions are later determined to be incorrect by the NLRB (and perhaps a court of appeals), the employer will be held liable for potentially large back pay and other make-whole relief. *See Corbett, supra* note 7, at 848-50. *See generally* Dennis O. Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237, 302 n.346 (1989) ("When a union strikes, the employer can hire replacements and the employees may be forced to seek employment elsewhere, but NLRA obligations create very high transaction costs which severely restrict the employer's ability to seek employees outside of the members of the certified unit.").

<sup>49</sup> Bierman & Gely, *supra* note 25, at 379-80. Many other commentators have recognized this principle. *See, e.g.,* Douglas L. Leslie, *Retelling the International Paper Story*, 102 YALE L.J. 1897, 1898-99 (1993) ("Unions win strikes for a number of reasons. . . . [M]ost importantly, a union can win a strike if the workers possess skills and knowledge that are specific to the firm or the industry, so that managers cannot replace them with newcomers, at least in the short run."); *see also* Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 358 (1984) (explaining that firms may incur heavy costs when an employee with firm-specific skills leaves the firm because costs of training a replacement "are directly proportional to the firm-specific knowledge or skills of the exiting employee"); Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1358 (1988) (observing that, because workers with job-specific training have a productivity advantage over workers without such training, the replacement labor pool is diminished).

A corollary to the difficulty of replacing employees with firm-specific training is that employers may most need to be able to offer permanent status in order to attract replacements to those positions. Potential replacements may be reluctant to invest in firm-

Thus, Bierman and Gely underestimate the limitations imposed on employers' right to permanently replace strikers under current law. Explaining the inadequacy of two of the limitations identified by Cohen and Wachter is not a full treatment of the restrictions currently imposed on the *Mackay* doctrine. Although more restrictions are needed to deter opportunistic behavior by employers, the extreme reform Bierman and Gely recommend, overruling *Mackay*, is not necessary. Indeed, that first step in Bierman and Gely's proposal brings them to the second part of Cohen and Wachter's theory on the efficiency of the *Mackay* doctrine: it deters opportunistic behavior by unions. If *Mackay* were overruled, what would deter unions from the opportunistic behavior of making demands that would impose substantial hardship on employers and calling strikes to obtain their demands? Bierman and Gely's failure to answer that question demonstrates why the first step in their proposal is unwise.

#### B. Failure to Propose an Effective Restriction on Opportunistic Behavior by Unions to Replace the *Mackay* Doctrine

Bierman and Gely recognize that overruling *Mackay* increases the likelihood of opportunistic behavior by unions and employees.<sup>50</sup> Some commentators postulate that, if employers were prohibited from hiring permanent replacements, unions would be quicker to call strikes,<sup>51</sup> and, because strikes would involve a substantially reduced risk, unions would call strikes to obtain excessive demands.<sup>52</sup> If *Mackay* were overruled as Bierman

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specific training if the job offer is for no more than the duration of a strike. On the diminution of the substitute labor pool if employers were limited to hiring temporary replacements, see Michael H. LeRoy, *Changing Paradigms in the Public Policy of Striker Replacements: Combination, Conspiracy, Concert, and Cartelization*, 34 B.C. L. REV. 257, 305 (1993).

<sup>50</sup> Bierman & Gely, *supra* note 25, at 370 ("[I]f the *Mackay* doctrine was overturned and unions were given total protection against the hiring of permanent replacements, employers might well be subject to some form of opportunistic behavior on the part of unions."); *id.* at 382 ("[T]he American Airlines scenario also illustrates the opportunistic leverage potentially open to unions if the *Mackay* doctrine is simply overturned without more."); *id.* at 387 ("[I]f unions are allowed to strike knowing that their members cannot be permanently replaced, they will be free to engage in strikes and in that way expropriate rents due to the employer under their agreement.").

<sup>51</sup> *E.g.*, Brendan Dolan, *Mackay Radio: If It Isn't Broken, Don't Fix It*, 25 U.S.F. L. REV. 313, 317 (1991).

<sup>52</sup> *E.g.*, David Westfall, *Striker Replacements and Employee Freedom of Choice*, 7 LAB. LAW. 137, 146 (1991).

and Gely propose, what would deter unions from engaging in such opportunistic behavior? I find no satisfactory answer in their article.

Bierman and Gely suggest that the second step of their proposal, making permanent replacement a mandatory bargaining topic, would deter unions from acting opportunistically. I disagree. That step would not provide employers any protection against opportunistic behavior by unions. One consequence of an issue being labelled a mandatory topic is that if either party wishes to bargain about it, the parties have a duty to bargain in good faith about that topic.<sup>53</sup> Thus, under Bierman and Gely's proposal, an employer could insist that a union bargain with it on the issue of permanent replacement, and the union would be required to do so. A second ramification of a topic being classified as a mandatory topic, however, is that either party can insist upon its position on that issue to impasse and use economic force in support of its position.<sup>54</sup> Thus, under Bierman and Gely's proposal, a union could maintain its position on striker replacement (or any other mandatory topic) and back it up with a strike. Because Bierman and Gely's first step was to shift the rule and prohibit permanent replacement, the employer could not hire permanent replacements during such a strike. Ironically then, the second step of Bierman and Gely's proposal, adding a contentious topic to those mandatory topics on which unions can strike, actually could exacerbate, rather than alleviate, the increased potential for opportunistic behavior by unions under their proposal.<sup>55</sup>

Bierman and Gely's answer to this challenge seems to be that unions will bargain on this issue toward "mutual gain by exchange"<sup>56</sup> if the initial rule is set in their favor, whereas employers will not. It is likely that unions would bargain about permanent replacement if it were declared a mandatory bargaining topic; it would be an unfair labor practice to refuse to do so. The pivotal question is whether unions would be willing to make exchanges on this issue so that agreements could be achieved; if not, they could call strikes in support of their position. Bierman and Gely suggest that the permanent

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<sup>53</sup> NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 498 (1976).

<sup>54</sup> GORMAN, *supra* note 53, at 498.

<sup>55</sup> I would not object to making permanent replacement a mandatory topic under the current striker replacement law. My point is that making it a mandatory topic after overturning *Mackay* would not deter unions' opportunistic behavior. I am skeptical, however, that making striker replacement a mandatory topic under current law would facilitate bargaining. See Lynch, *supra* note 48, at 278-79 (arguing that the mandatory/permissive distinction may not practically affect the parties when bargaining for a collective bargaining agreement).

<sup>56</sup> Bierman & Gely, *supra* note 25, at 385, 393 (quoting ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 6 (1988)).

replacement issue is more likely to be resolved by the parties themselves if the initial rule favors the union.<sup>57</sup> The next section explains why their argument on this point is unpersuasive.

### *C. Effect on Collective Bargaining of Shifting the Default Entitlement to Unions*

Why would unions with the default entitlement<sup>58</sup> be more likely to bargain toward mutual exchange and agreement than employers with the default entitlement? First, according to Bierman and Gely, unions would be more likely to bargain to agreement because calling strikes hurts their members.<sup>59</sup> Second, unions value the right more than employers, and so they should be given the opportunity to exchange it for something they value more highly.<sup>60</sup> Both of these propositions are dubious.

#### *1. Effect of Strike Hardship on Willingness to Call Strikes*

It is true that strikes inflict hardship on striking employees because they forego their regular paychecks while on strike.<sup>61</sup> It is also true that harming the employer by striking ultimately may harm the employees who are dependent on the employer for their financial well-being.<sup>62</sup> Bierman and Gely's argument that these considerations will make unions more likely than employers to

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<sup>57</sup> *Id.* at 387-88.

<sup>58</sup> "Default entitlements" or "default settings" is the term used by Professors Wachter and Cohen to denote "entitlements that apply in the absence of a contrary agreement, or in the presence of an ambiguous agreement, between contracting parties." Wachter & Cohen, *supra* note 49, at 1365. Professor Leslie uses "gap-filling rule" in the same way. LESLIE, *supra* note 26, at 426.

<sup>59</sup> Bierman & Gely, *supra* note 25, at 388 n.154. This discussion is relevant to which party should be assigned the initial entitlement. Professors Wachter and Cohen posit that property rule entitlements (things that can be taken only through voluntary purchases, Wachter and Cohen, *supra* note 49, at 1366 n.88) are "relatively efficient" when the default entitlement is assigned to the party that values the entitlement more or the party that is less likely to use it strategically. Wachter & Cohen, *supra* note 49, at 1370. Bierman and Gely argue that unions, which are reluctant to strike, are less likely to use the default entitlement strategically. Bierman & Gely, *supra* note 25, at 388 n.154.

<sup>60</sup> Bierman & Gely, *supra* note 25, at 387-88.

<sup>61</sup> *Id.* at 388 n.154; *see also* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 129 (1990) (describing the strike as a "two-edged sword").

<sup>62</sup> Bierman & Gely, *supra* note 25, at 388 n.154; *see also* Kamiat, *supra* note 29, at 43.

bargain toward agreement, however, fails to take into account several principles.

First, although strikes impose hardships on strikers under the current law, they still are conducted. Why? Apparently unions and the employees they represent think that the bargaining concessions an employer will make to end a strike are greater than the hardship imposed on the employees for the duration of the strike. If the principal impediment to strikes<sup>63</sup> were removed, it is likely that unions would be less reluctant to call strikes. Furthermore, although going without a paycheck is undeniably painful, the strikers and unions would control how long they endure the pain, as the strikers could obtain reinstatement upon making unconditional offers to return to work, and the employer would be required to reinstate them.<sup>64</sup>

Second, unions are not limited to either calling strikes and causing their members to suffer or bargaining with employers and earnestly trying to achieve agreements. The threat of a strike (tapping fingers on the holstered gun), with the employer prohibited from hiring permanent replacements, might be enough to cause an employer to shy away from its demands.<sup>65</sup> Unions, like employers under the current law, could act opportunistically by using the threat of unchecked economic force to cause employers to accede to unreasonable demands.<sup>66</sup>

Finally, it does not necessarily follow that, because the employees' future economic well-being may depend on the employer, they and their union will not make excessive demands and support them with damaging strikes.<sup>67</sup> Employees and unions, even if provided with information by an employer regarding the economic harm that would result from agreeing to their demands, may evaluate the information differently than the employer. For example, some

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<sup>63</sup> See *supra* note 4 and accompanying text.

<sup>64</sup> The employer would be required to reinstate them unless the employer announced a lockout at or before the time the strikers made offers to return. *Eads Transfer, Inc.*, 304 N.L.R.B. 711, 713 (1991), *enforced*, 989 F.2d 373 (9th Cir. 1993).

<sup>65</sup> Under the current rule on striker replacement favoring employers, some employers use the threat of permanent replacement to exercise leverage at the bargaining table. See Ray, *supra* note 24, at 365. Some employers also use the threat of hiring permanent replacements to end strikes without ever actually hiring permanent replacements. See CHARLES S. LOUGHRAN, *NEGOTIATING A LABOR CONTRACT: A MANAGEMENT HANDBOOK* 430 (2d ed. 1992) (describing a threat to hire permanent replacements as "a powerful incentive to motivate union negotiators to seek a settlement before or during a strike"); see also Corbett, *supra* note 7, at 815-26 (describing the effect of Caterpillar's threat of permanent replacement on the UAW's strike in 1991-92).

<sup>66</sup> Lynch, *supra* note 48, at 302 (discussing both parties' use of threats and lies to gain the terms they want).

<sup>67</sup> Westfall, *supra* note 52, at 147 (asserting that a "vast leap of faith" is required to conclude that such a realization is a sufficient deterrent).



employees may be concerned with the financial stability and competitiveness of the employer only in the short term, after which their own financial well-being may no longer depend on the employer.

## 2. Default Entitlement—Unions or Employers?

### a. Current Law Does Not Prevent Parties From Contracting Around the Default Entitlement (But They Do Not)

Bierman and Gely observe that it is paradoxical that none of the previous proposals to reform striker replacement law have attempted to use the collective bargaining process.<sup>68</sup> An initial response is that no reform of the law is necessary to make such a solution possible. Although Bierman and Gely are correct that no case has decided whether permanent replacement is a permissive or mandatory topic,<sup>69</sup> there is nothing in the Act or any court or Board decision suggesting that it is an illegal topic.<sup>70</sup> Thus, it is at least a permissive topic, and the parties could bargain about it if both wished to do so.<sup>71</sup> Yet, employers and unions typically have not included provisions in collective bargaining agreements prohibiting employers from hiring permanent replacements for all the members of a collective bargaining unit or for any of them.<sup>72</sup> Employers have retained the initial entitlement granted by *Mackay*.

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<sup>68</sup> Bierman & Gely, *supra* note 25, at 384.

<sup>69</sup> *Id.* at 388–89.

<sup>70</sup> There are three types of bargaining topics: mandatory, permissive, and illegal. GORMAN, *supra* note 53, at 498.

<sup>71</sup> See Lynch, *supra* note 48, at 291 n.292 (“The right of an employer to permanently replace an economic striker under *Mackay* can be conceptually treated as an entitlement that the employer can transfer to the union.”); see also 470 Stratford Holding Co. v. Local 32B–32J, Serv. Employees Int’l Union, 805 F. Supp. 118, 126 (E.D.N.Y. 1992) (rejecting argument that employer had agreed to waive *Mackay* right under collective bargaining agreement, but recognizing that “statutorily-protected right” can be waived by “clear and unmistakable” agreement).

<sup>72</sup> See 2 BUREAU OF NAT’L AFFAIRS, COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS ch. 77 (discussing and giving examples of basic patterns for contract terms regarding strikes and lockouts; no clause prohibiting the hiring of permanent replacements is included).

In some cases arbitrators, even in the absence of an express provision prohibiting employers from hiring permanent replacements, have strained to interpret collective bargaining agreements as waiving the employer’s *Mackay* right. See *Meyers v. Parex, Inc.*, 689 F.2d 17 (2d Cir. 1982) (affirming arbitrator’s award interpreting collective bargaining agreement, through interaction of three sections, as waiving the employer’s right to permanently replace striking employees without notice); *Edna H. Pagel, Inc. v. Teamsters Local Union 595*, 667 F.2d 1275 (9th Cir. 1982) (affirming arbitrator’s award interpreting

Why have the parties themselves not negotiated such clauses? Bierman and Gely answer that the employer has no incentive to bargain on this issue "because any negotiation will by definition make the employer worse off."<sup>73</sup> Do they mean to say that employers value the right to hire permanent replacements so highly that they are unwilling to sell it to unions at any price? It is inconsistent for Bierman and Gely to assert that employers value the right so much that they will not bargain about exchanging it and also to assert that unions value the right more highly than employers, but giving them the default entitlement will facilitate bargaining because they will be willing "to exchange the protection against permanent replacements for other bargaining demands they might value more highly."<sup>74</sup> The fact that employers do not bargain away the initial entitlement indicates that they value the right more highly than unions.

b. *Why Should the Default Entitlement Be Shifted?*

Bierman and Gely root their proposal for reforming striker replacement law in the law and economics objective of achieving efficiency in collective bargaining.<sup>75</sup> In view of that objective, they should explain why shifting the default entitlement to unions will produce efficient results. They assert that, in the presence of transaction costs, bargaining structure matters and the initial allocation of rights will affect the likelihood of successful bargaining.<sup>76</sup> Which party should be favored by the initial entitlement in order to facilitate bargaining for mutual exchange and efficient results? Unions, say Bierman and Gely. Why? Because, they assert, unions value the right more than employers.<sup>77</sup> The lack of analysis supporting this assertion calls its validity into question.

An initial assumption that Bierman and Gely make regarding application of

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clause prohibiting discharge for picketing or honoring picket lines as precluding permanent replacement of striking employees). *But see 470 Stratford Holding Co.*, 805 F. Supp. at 126 ("[T]he fact that a collective bargaining agreement includes a justifiable discharge provision in no way indicates that the employer waived his statutorily-protected right to hire permanent replacement workers.").

<sup>73</sup> Bierman & Gely, *supra* note 25, at 387; *see also id.* at 393 ("[U]nder the current scheme of things, there is almost no incentive for employers to bargain with respect to this issue.").

<sup>74</sup> *Id.* at 388.

<sup>75</sup> *See id.* at 384-88 (describing the opportunity for "mutual gain by exchange"); *id.* at 366 (disagreeing with Wachter and Cohen on efficiency of the *Mackay* doctrine and styling their proposal a "remedy [to] this problem").

<sup>76</sup> *Id.* at 386.

<sup>77</sup> *Id.* at 387-88.

the Coase Theorem<sup>78</sup> to collective bargaining merits some attention. They assume that transaction costs do affect the efficient allocation of entitlements in collective bargaining. According to the Coase Theorem, in the absence of transaction costs, parties will reach efficient agreements regardless of which party has the initial entitlement.<sup>79</sup> When transaction costs do not affect the efficient allocation, the initial entitlement should be allocated in accordance with what most parties would agree to if they bargained over the issue, so that most parties can rely upon the gap-filler and be spared whatever transaction costs are associated with bargaining.<sup>80</sup> Because collective bargaining agreements do not shift the entitlement to the union,<sup>81</sup> the initial entitlement should be as it is under current law.

Bierman and Gely assert, however, that transaction costs do interfere with the efficient allocation of entitlements in collective bargaining.<sup>82</sup> There is disagreement on this matter among commentators.<sup>83</sup> If Bierman and Gely are correct, however, the presence of transaction costs could explain why collective bargaining agreements do not have clauses that prohibit the hiring of permanent replacements even if, as Bierman and Gely assert, unions value the right more highly than employers.<sup>84</sup> Still, one would expect to find some situations in

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<sup>78</sup> The theorem was first suggested in Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

<sup>79</sup> Bierman & Gely, *supra* note 25, at 385; see also COOTER & ULEN, *supra* note 56, at 101 n.11; Lynch, *supra* note 48, at 299; Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 246, 258 (1987).

<sup>80</sup> LESLIE, *supra* note 26, at 425.

<sup>81</sup> See *supra* notes 70–74 and accompanying text.

<sup>82</sup> Bierman & Gely, *supra* note 25, at 386–87.

<sup>83</sup> Compare LESLIE, *supra* note 26, at 425 (asserting that there are “serious transactions costs in labor-management gap-filling”) with Schwab, *supra* note 79, at 266–68 (contending that transaction costs do not interfere with efficient allocation of entitlement when the difference in valuation of entitlement by parties exceeds costs of bargaining, and asserting that bargaining costs are lower in labor bargaining than in other contexts) and Lynch, *supra* note 48, at 300 (arguing that transaction costs are close to zero). Professors Wachter and Cohen describe Leslie and Schwab as “stak[ing] out polar cases in the debate over the trading of entitlements.” Wachter & Cohen, *supra* note 49, at 1366 n.61. Wachter and Cohen argue, in their “middle ground” position, that the transaction costs of strategic behavior and asymmetric behavior sometimes interfere with the efficient exchange of entitlements, but that the parties often overcome those transaction costs and agree to efficient contracts. *Id.*

<sup>84</sup> Professor Leslie uses the term “trivial entitlement” to describe an entitlement for which the transaction costs are greater than the gain from obtaining a contractual reversal of the default entitlement. LESLIE, *supra* note 26, at 426. Leslie’s further description of how unions would seek to obtain such an entitlement could apply to organized labor’s efforts to obtain the default entitlement on permanent replacement:

which some unions have succeeded in obtaining such clauses through bargaining if they value the entitlement more than employers.<sup>85</sup>

Assuming, *arguendo*, that Bierman and Gely are correct about transaction costs interfering with the transfer of entitlements to parties that value them the most, with which party, employer or union, should the law place the default entitlement regarding permanent replacement? Bierman and Gely state the law should do three things: (1) increase the likelihood of successful bargaining; (2) minimize transaction costs associated with bargaining; and (3) provide adequate enforcement mechanisms when bargaining fails.<sup>86</sup> Apparently guided by those objectives, they argue that the default entitlement should be allocated to the "union, the party which probably values this right the most."<sup>87</sup>

Assigning the default rule to the party that values it the most is one of the approaches advocated by commentators.<sup>88</sup> How do Bierman and Gely conclude that unions value the entitlement more highly than employers? They offer no support for their conclusion. As Professor Leslie observes, identifying the party that values the entitlement more highly "involves more than just a little speculation": it involves identifying the benefits to the parties from engaging in the conduct, and "the risks of unforeseen events and strategic behavior."<sup>89</sup> Considering the bargaining leverage that the permanent replacement entitlement gives to the party that has it initially<sup>90</sup> and the potential for strategic behavior

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It is consistent with the value of a gap-filling rule being trivial that there is substantial lobbying with the Board, courts, or the legislature, for a reversal of the rule. The value of a particular right when summed across all [effected] unions might be substantial, and so the AFL-CIO or [effected] international unions might do the lobbying. Moreover, the value of a particular rule may be low because the probability (*ex ante*) of its invocation is low, although once the event triggering the rule has occurred, the (*ex post*) value of the rule may warrant litigation by the parties affected.

*Id.* at 426 (footnote omitted). Although the consequences of permanent replacement can be devastating when actually invoked, *see, e.g.*, Michael Arndt, *Casualties Rise in Strike War Walkout Losers, Employers Spar over Crucial Bill*, CHI. TRIB., June 13, 1994, § 4, at 1, it is rarely implemented by employers. The U.S. General Accounting Office estimates that employers actually hired permanent replacements in about seventeen percent of the strikes in 1985 and 1989. U.S. GEN. ACCOUNTING OFFICE, LABOR-MANAGEMENT RELATIONS: STRIKES AND THE USE OF PERMANENT STRIKE REPLACEMENTS IN THE 1970S AND 1980S, H.R. DOC. NO. 2, 102d Cong., 1st Sess. 15 (1991).

<sup>85</sup> See *supra* notes 70-74 and accompanying text.

<sup>86</sup> Bierman & Gely, *supra* note 25, at 385.

<sup>87</sup> *Id.* at 387-88 (footnote omitted).

<sup>88</sup> LESLIE, *supra* note 26, at 431; Schwab, *supra* note 79, at 287 ("In a world of costly transactions, efficiency is promoted by awarding an entitlement to the party who values it most highly and would have obtained it but for the transaction costs.").

<sup>89</sup> LESLIE, *supra* note 26, at 432.

<sup>90</sup> See *supra* note 65 and accompanying text.

by that party, I think it is difficult to determine whether generally employers or unions value the right more highly. An alternative basis for allocating the default entitlement may prove more useful.

Another basis for selecting the initial entitlement is choosing the setting that involves lower transaction costs.<sup>91</sup> Indeed, Bierman and Gely identify this choice as one of the roles of the law in providing a framework for negotiations.<sup>92</sup> Professor Leslie identifies several transaction costs relevant to setting default entitlements in collective bargaining.<sup>93</sup> These transaction costs also have been treated as part of the unions' difficulties in valuing an entitlement and in justifying to their members an exchange of an entitlement.<sup>94</sup> Under either treatment, consideration of these factors suggests that shifting the default entitlement on permanent replacement to unions would not minimize transaction costs and increase the likelihood of successful bargaining—two of the goals Bierman and Gely identify for their proposal.<sup>95</sup>

Leslie uses the term "batch theory" as the name for the situation arising out of the fact that terms in collective bargaining agreements are negotiated in batches.<sup>96</sup> Because the tradeoffs involved in negotiations may be complex, it may be difficult for unions to explain to their members what they got in exchange for relinquishing a right initially conferred by law.<sup>97</sup> Because of this problem, unions that have the default entitlement may refuse to bargain it away.<sup>98</sup> Consequently, it may be more costly for the parties to move from a default rule giving the union the initial entitlement to an agreement transferring the entitlement to the employer than vice versa.<sup>99</sup>

A second transaction cost or valuation problem, related to the first, has been discussed as the difference in valuation of opportunity cost income and realized income<sup>100</sup> and a "No Backwards Steps" strategy of unions.<sup>101</sup> The

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<sup>91</sup> LESLIE, *supra* note 26, at 431.

<sup>92</sup> Bierman & Gely, *supra* note 25, at 389.

<sup>93</sup> LESLIE, *supra* note 26, at 425–31.

<sup>94</sup> Lynch, *supra* note 48, at 300 n.335; *see also* Schwab, *supra* note 79, at 275 (discussing the effect that shifting the default entitlement has on valuation of entitlement).

<sup>95</sup> Bierman & Gely, *supra* note 25, at 389.

<sup>96</sup> LESLIE, *supra* note 26, at 426–28.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 431 & n.26.

<sup>100</sup> Lynch, *supra* note 48, at 300 n.335, 302–04; Schwab, *supra* note 79, at 275–77. Lynch interprets Leslie's "framing theory" as describing a similar phenomenon. Lynch, *supra* note 48, at 303–04 n.355. Framing theory describes individuals' risk aversion when gains are at stake and risk preference when losses are at stake. LESLIE, *supra* note 26, at 429–30.

<sup>101</sup> Schwab, *supra* note 79, at 277 (explaining meaning of phrase and noting that it originated with John L. Lewis).

phenomenon described by these terms is that employees will value an entitlement that initially belongs to them more highly than they will value the same entitlement if it initially belongs to the employer.<sup>102</sup> Consequently, unions will charge employers more to purchase the entitlement than unions would pay employers for that entitlement.<sup>103</sup> If this result is true, it suggests that bargaining to agreement is less likely when the union has the initial entitlement than when the employer has it. One aspect of unions as collective bargaining representatives and two characteristics of the permanent replacement issue suggest that the higher valuation of the initial entitlement (realized income) will be exaggerated in the collective bargaining context, with the likely result that most unions will not sell the entitlement for any price that employers are likely to offer.

Union leaders must assess not their own differential valuations of realized income and opportunity cost income, but that of the bargaining unit members whom they represent.<sup>104</sup> Because of the difficulty of this overall assessment, union leaders may find it politically expedient to preserve an initial entitlement like a prohibition on permanent replacement even if that means achieving lower gains in other terms and conditions of the agreement.<sup>105</sup>

Selling the right to permanently replace strikers would diminish or decimate the ability of a union to mount a successful strike against an employer. Groups of employees with respect to whom a union sells an employer the right to permanently replace are not likely to go out on strike,<sup>106</sup> nor should the union expect them to do so.

A second condition peculiar to the permanent replacement issue which is likely to increase the union's valuation of the initial entitlement (realized income) vis-à-vis the opportunity cost income is the potential ripple effect of selling the entitlement on future negotiations for new collective bargaining agreements. If a union sells the entitlement, it is also, to a large extent, selling its leverage in future negotiations. Bierman and Gely propose that any contractual provision on permanent replacement would survive the expiration

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<sup>102</sup> Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 678-95 (1979); Lynch, *supra* note 48, at 303-04; Schwab, *supra* note 79, at 276.

<sup>103</sup> Lynch, *supra* note 48, at 303; Schwab, *supra* note 79, at 276.

<sup>104</sup> Lynch, *supra* note 48, at 304.

<sup>105</sup> *Id.*

<sup>106</sup> One may argue that under the current law employees strike notwithstanding the threat of permanent replacement. Employees perceive no irony, however, that unions call on them to strike now under the threat of permanent replacement when employers have the initial entitlement. In contrast, employees will not miss the irony of being asked to strike under the threat of permanent replacement when the very union advising them to strike sold their protection.

of the collective bargaining agreement.<sup>107</sup> I agree with them that such a requirement would be necessary to make the entitlement to permanently replace something that an employer would be interested in purchasing. Most strikes occur during negotiations for a new collective bargaining agreement; consequently, the greatest value of a permanent replacement clause to an employer would be during negotiations for a new agreement. A corollary to this, however, is that a union trades its future leverage for a good collective bargaining agreement in the present. Unions will not fail to recognize this point, and the likely result is that unions will refuse to sell the entitlement to employers at virtually any price.

In sum, Bierman and Gely's basis for setting the default entitlement on permanent replacement in favor of unions is that unions value it more highly than employers. They do not support that conclusion, and it would be difficult to determine which party does value the entitlement more highly. In view of that difficulty, it might be more useful to allocate the default entitlement according to which setting entails lower transaction costs and promotes bargaining. At least two significant factors suggest that shifting the initial entitlement would not accomplish those objectives.

#### *D. The Bargaining Strategy Advocated by Bierman and Gely*

Bierman and Gely's proposal is designed to make it possible for unions to sell the right to permanently replace strikers to employers with respect to some employees (those with general skills) but not others (those with firm-specific skills). Bierman and Gely recognize that situations exist in which a union represents a bargaining unit in which there are both types of employees.<sup>108</sup> These situations and the bargaining strategy that Bierman and Gely recommend as a response to these situations raise problems.<sup>109</sup> I think that unions generally

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<sup>107</sup> Bierman & Gely, *supra* note 25, at 390-91.

<sup>108</sup> *Id.* at 388 (asserting that their proposal allows employers and unions to distinguish between skill levels of employees); *id.* at 391-92 (arguing that unions would not lose breach of the duty of fair representation lawsuits as a result of negotiating agreements distinguishing between employees with specific skills and those with general skills).

<sup>109</sup> These problems may be addressed by including firm-specific skills and general skills as community of interest factors in an effort to reduce or eliminate "mixed" units. *See, e.g.,* GORMAN, *supra* note 53, at 68-74 (discussing community of interest factors used to determine what constitutes an appropriate bargaining unit). Introducing more factors about which parties can disagree prior to a representation election, however, could further complicate unit determination and further delay employees' opportunity to be represented by a labor organization. *Cf. Remarks of NLRB Chairman Gould to the Commonwealth Club, San Francisco*, Daily Lab. Rep. (BNA) No. 111 (June 13, 1994) (decrying wastefulness and delay of litigation over appropriate bargaining units and advocating adoption of more

would not adopt the bargaining strategy for mixed units advocated by Bierman and Gely, and further, I think that they should not do so.

### 1. *Unions Would Not Adopt the Bargaining Strategy*

First, Bierman and Gely assume that, because an employer would be acting opportunistically by permanently replacing employees with firm-specific skills, unions, favored with the default entitlement, necessarily would be solicitous of protecting those employees. Although some unions might have a singular concern for employees with firm-specific skills, unions also have self-interest considerations that are significant in shaping their bargaining strategies. One is that a union must retain the support of a majority of the bargaining unit members lest it risk losing its status as the exclusive bargaining representative.<sup>110</sup> Furthermore, under many circumstances, bargaining unit members are not required to pay dues and fees to a union.<sup>111</sup> Thus, a union, deciding for which employees it would sell the right of permanent replacement (if any), may be more concerned with self-preservation than protecting employees with firm-specific skills.

A union's bargaining strategy also must take into account the bargaining strategy of the employer. If the union has the default entitlement on permanent replacement, the employer's bargaining strategy will emphasize purchasing the right to permanently replace which employees? In order to attract replacements who will invest in firm-specific skills, employers may find it necessary to offer permanent status.<sup>112</sup> Employees with general skills who can begin working with little or no training are likely to be easier to attract, even if all that employers can offer is temporary status. Thus, it is the very employees that

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definitive rules). Furthermore, this new approach to determining bargaining units would apply only to new bargaining units. The problems discussed below would continue to arise for pre-existing mixed units.

<sup>110</sup> This loss of status could occur through withdrawal of recognition by the employer, supported by a good faith doubt in the majority status of the union, or a loss in a decertification election or an election in response to an employer's RM petition. See generally DOUGLAS E. RAY & EMERY W. BARTLE, *LABOR-MANAGEMENT RELATIONS: STRIKES, LOCKOUTS AND BOYCOTTS* §§ 8:01-:06 (1992).

<sup>111</sup> This option depends on whether the particular state has a right-to-work statute, and if not, whether the collective bargaining agreement contains a union security clause. See generally 2 *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* ch. 27 (Patrick Hardin et al. eds., 3d ed. 1992).

<sup>112</sup> LeRoy, *supra* note 49, at 305-06 ("Particularly for employers who rely on a skilled workforce, [a prohibition on hiring permanent replacements] would virtually cut off the supply of qualified replacement workers: there would be no effective working through strikes.").



Bierman and Gely argue unions should protect for whom employers are likely to pay a lot for the right to replace. Will unions sell employers that right? It may depend on how much the unions can get for how many of their other bargaining unit members.

## 2. Unions Should Not Adopt the Bargaining Strategy

Bierman and Gely assert that unions would not be likely to lose breach of the duty of fair representation cases for selling the permanent replacement protection with respect to some groups of employees and not others.<sup>113</sup> They are probably correct on this point.<sup>114</sup> I do not think the probability of their winning such lawsuits means, however, that they should adopt a bargaining strategy of making distinctions among groups of employees within a bargaining unit regarding sale of the right to permanently replace.

To differentiate among employees regarding sale of the right to permanently replace would be extremely divisive, splintering the bargaining unit and setting it at war against itself. Of course, unions now negotiate for different rates of pay and other differences in terms and conditions for different groups of employees within bargaining units. But to do so with permanent replacement would be different. This entitlement involves matters of job security and ability to strike.<sup>115</sup>

## IV. CONCLUSION

I agree with Professors Bierman and Gely that the law on striker replacement should be reformed. I disagree, however, with the initial step of their proposal—taking Employer's gun from him. While that step would prevent Employer from shooting Union's people, it also might tempt Union to

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<sup>113</sup> Bierman & Gely, *supra* note 25, at 391–93.

<sup>114</sup> The Supreme Court has held that, when evaluating a union's performance in negotiations, the Court must be "highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991).

<sup>115</sup> Consider organized labor's opposition to *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989). The Supreme Court held that an employer did not violate the Railway Labor Act by refusing, at the conclusion of a strike, to replace junior strike crossovers with more senior employees who did not cross over. *Id.* at 432. The case illustrates a differentiation among the rights of bargaining unit members which pits members against each other on job security, and by creating such rifts, impinges on a union's ability to conduct a successful strike. The decision is so vehemently opposed by organized labor that it, along with *Mackay*, would have been overturned by the Workplace Fairness Act. H.R. REP. NO. 116, 103d Cong., 1st Sess., pt. 1, at 1, 2, 39 (1993).

shoot Employer, and Bierman and Gely do not explain how their law would prevent that. They do not recognize that there already are several laws that discourage Employer from shooting up the town and that some other laws can be made which would further discourage Employer without taking his gun and leaving him at the mercy of Union. Bierman and Gely are confident that Union would not shoot Employer. I think that is a naive view of how the two old gunslingers are likely to act.

Bierman and Gely think that Union would negotiate with Employer about selling back his gun to him. They do not appreciate Union's apprehension about explaining to his people why he sold the gun back to Employer. Besides, if Union sells it back to him, Union and his people can expect Employer to come to the next meeting with it loaded.

Finally, Union cannot bargain with Employer the way Bierman and Gely want him to. If he did, his people would turn on each other, and when he needed them to fight with Employer, many of them would not be willing to put their lives on the line. And who could blame them if Union were willing to sacrifice some of them?